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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

UNITED STATES OF AMERICA, Petitioner, 9 1997

v.

GEORGE LaBONTE, ALFRED LAWRENCE HUNNEWELL,
AND STEPHEN DYER, Respondents.

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On Writ of Certiorari
to the United States Court of Appeals for the First Circuit

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RESPONDENT DYER'S POST-ARGUMENT MOTION
TO DISMISS THE WRIT, AS TO HIM, AS IMPROVIDENTLY GRANTED

Respondent Dyer moves this Court to dismiss the writ, as to him, as improvidently granted, because the judgment of the court below would have to be affirmed regardless of this Court's ruling on the Question Presented. The factual basis for the instant motion is not applicable to respondent LaBonte or respondent Hunnewell, who therefore do not join in this motion.

1. This Court granted certiorari in this case to decide whether the U.S. Sentencing Commission violated its obligations under 28 U.S.C. § 994(h) when it adopted Amendment 506 to the United States Sentencing Guidelines. Amendment 506 revised the commentary accompanying the Career Offender Guideline, USSG § 4B1.1, to define "offense statutory maximum" so as to disregard enhancements to offense maximums triggered solely by a

defendant's prior convictions. Underlying the Question Presented and included within it is the question whether the courts must accord deference to the Sentencing Commission's interpretation and implementation of its governing legislation, the Sentencing Reform Act, whenever the Act is either silent or ambiguous. Oral argument was held yesterday, January 7, 1996.

2. In preparation for argument (and not before) counsel for respondent Dyer realized that the validity vel non of Amendment 506 under 28 U.S.C. § 994(h) does not affect his eligibility for a sentence reduction under that amendment.¹ Rather, Dyer was sentenced as a career offender because the Commission elected to go beyond the requirements of § 994(h) in defining the offenses that trigger career offender status under USSG § 4B1.1. See USSG § 4B1.2 & comment. (nn. 1-2). In doing so, it exercised authority (if it had any such authority at all, see Resp.Br. at 17 & n.10) not under the specific mandate of 28 U.S.C. § 994(h) but under Congress's general grant of power to the Commission to design sentencing guidelines.

3. Section 994(h) directed the Sentencing Commission to devise a guideline that would push up to a near-maximum level the sentences of those offenders who stood convicted of certain offenses "described in" one of five specified federal drug statutes (or of a "crime of violence"), and who had previously

been convicted of at least two such drug or violent offenses.² Respondent Dyer's current offense, conspiracy in violation 21 U.S.C. § 846, is not an offense "described in" any of those provisions (nor is it a "crime of violence"). Resp. Br. 18 & n.11; see also U.S. Br. 10; Pet. Appx. 9a.

4. The circuits which permit the inclusion of drug conspiracy offenses as countable under the "career offender" guideline at all uniformly hold that the Commission's authority to do so derives not from 28 U.S.C. § 994(h) itself but rather from § 994(a) and other, more general authority of the Commission. See, e.g., United States v. Hightower, 25 F.3d 182 (3d Cir.), cert. denied, 115 S.Ct. 370 (1994). The government apparently agrees. Reply Br. 6-7 n.5. Thus, in respondent Dyer's case, the answer to the question whether Amendment 506 conforms with § 994(h) has no bearing on whether he can benefit from that amendment. For cases in which Career Offender sentencing is not mandated by the terms of § 994(h), the Commission's decision as to what such sentences should be cannot be invalidated by reference to any limitations of that provision.

5. For this reason, regardless of the Court's answer to the Question Presented, the district court had power under 18 U.S.C. § 3582(c) to resentence respondent Dyer on the basis of

¹ Undersigned counsel was appointed by this Court after certiorari was granted. Dyer was represented by retained counsel in the court of appeals, who did not advance the argument contained in this motion. Dyer represented himself in opposition to the government's certiorari petition and also failed to make the point advanced in this motion.

² The drug offenses specified in § 994(h) are violations of 21 U.S.C. §§ 841, 952(a), 955 and 959, and of 46 U.S.C. Appx. § 1901 et seq. See Pet. Appx. 114a; U.S. Br. 21a-22a.

Amendment 506.³ The judgment of the court below was therefore correct in any event.

WHEREFORE, as to respondent Dyer, the writ was improvidently granted and should be dismissed. In the alternative, if this Court reverses the judgment of the court below, his case, at least, should be remanded to the court of appeals for consideration of whether Amendment 506 nevertheless is valid as applied to persons, such as respondent Dyer, who are classified as career offenders only by virtue of the Sentencing Commission's expansion of that category beyond the minimum requirements of 28 U.S.C. § 994(h).

Dated: January 8, 1997

Respectfully submitted,



PETER GOLDBERGER
50 Rittenhouse Place
Ardmore, PA 19003-2276

(610) 649-8200

Counsel for Respondent Dyer

³ The Commission declared Amendment 506 to be retroactively enforceable under 18 U.S.C. § 3582(c). USSG § 1B1.10(c) (p.s.).